Supreme Court, U.S.
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No. 04-318

IN THE

Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, AND JOHN DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Global Index, Inc. v. Mkapa, No. 04-7016, 2004 WL 1368856 (D.C. Cir. June 17, 2004).....2

Haines v. Kerner, 404 U.S. 519 (1972).....2

Houston v. Lack, 487 U.S. 266 (1988).....2

Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) (per curiam).....3

Statutes and Federal Rules

Fed R. App. P. 4(a)(5).....1

Fed. R. App. P. 4(a)(6)..... *passim*

Other Authorities

Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002).....2

REPLY BRIEF FOR THE PETITIONER

The Petition demonstrated that there is a direct conflict between the Third Circuit's decision in this case—which held that an untimely *pro se* notice of appeal can *never* qualify as a motion to reopen under Federal Rule of Appellate Procedure 4(a)(6)—and the holdings of at least five other courts of appeals. (Pet. 7-12.) In those circuits—the First, Second, Fourth, Tenth, and Eleventh—courts will construe a notice of appeal as a motion to reopen under Rule 4(a)(6) if the notice indicates that the would-be appellant did not receive notice of entry of judgment from the district court in a timely fashion. This issue is an important and recurring one because *pro se* litigation is so common, because unschooled *pro se* litigants can be expected to make the error at issue in this case on a regular basis, and because access to an appellate court is frequently the only way a *pro se* litigant has to vindicate important rights, such as the parental rights at issue here. (Pet. 16-17.)

1. Respondents do not seriously dispute that there is a sharp conflict among the courts of appeals concerning whether a *pro se* litigant's notice of appeal can ever be construed as a Rule 4(a)(6) motion. Respondents the Family Court of New Castle County, Delaware and Master Loretta Young of the Family Court of New Castle County, Delaware (together, "the Delaware Respondents") concede the conflict outright. (Del. Opp. 6.) Respondent John W. Nails disputes the conflict only semantically, by pointing out that just two circuits—the Third in the decision below and the Eleventh—have analyzed the question by comparing the language of Rule 4(a)(6) to the language of Rule 4(a)(5). (Nails Opp. 7.) But this is sleight of hand. It is an attempt to shift the focus from legal conclusions (which is where it belongs) to legal analysis. While legal analysis is obviously of some interest, at the certiorari stage the central focus is usually on the decisions themselves and whether they will lead to conflicting results in cases involving similarly situated

parties. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 225 (8th ed. 2002) (noting that the Court rarely grants certiorari to resolve "differences between general principles or the reasoning involved in . . . two decisions"). The Third Circuit's decision in this case ensures that *pro se* litigants in Petitioner's situation will not have the same opportunity to pursue an appeal that they would have if they were litigating in the federal courts of the First, Second, Fourth, Tenth, or Eleventh Circuits. Accordingly, the "actual split" is the five-to-one split described in the Petition. Indeed, the recent decision in *Global Index, Inc. v. Mkapa*, No. 04-7016, 2004 WL 1368856 (D.C. Cir. June 17, 2004), cited by Respondent Nails (Nails Opp. 7 n.2, 11), raises a question whether the D.C. Circuit may have adopted a view close to the court below's, thus deepening the split.

2. There can be no doubt that the issue here is important and recurs frequently, albeit often in the unpublished realm in which *pro se* litigants operate. Again, the Delaware Respondents make no effort to dispute this fact. Respondent Nails does dispute it after a fashion, but only by noting that the issue lacks "significant national implications for all federal appellants" and figures only rarely in published opinions. (Nails Opp. 19.) The fact that the issue concerns only *pro se* litigants, not "all federal appellants," is irrelevant—otherwise this Court would never hear cases about *pro se* procedure, as it has not infrequently done. *See, e.g.*, *Houston v. Lack*, 487 U.S. 266 (1988); *Haines v. Kerner*, 404 U.S. 519 (1972). As for the suggestion that published opinions on the question presented are few and far between, that is simply the nature of *pro se* litigation—*pro se* litigants will rarely have the knowledge or resources to brief the Rule 4(a)(6) issue or even to raise it in a way that would likely result in a published opinion.

Indeed, given the nature of the question presented, no doubt many cases are resolved adversely to would-be appellants by way of summary dismissals that are

unaccompanied by any opinion, published or otherwise. Thus, the extent of the conflict is likely even greater than the identifiable split would suggest. The Third Circuit's decision in this case, which is certainly the fullest statement of the view that a *pro se* notice of appeal can never be construed as a motion to reopen under Rule 4(a)(6), thus offers an unusual and especially good vehicle for resolving the question. And now that there are carefully reasoned, published decisions on both sides of the question, there is little, if anything, to be gained by letting the issue percolate further.

3. The Petition demonstrates that the Third Circuit's decision elevates form over substance by insisting on a talismanic use of the word "motion" or something like it. That word is, after all, the only thing that distinguishes a "motion" pointing out late receipt of the district court's judgment from a "notice of appeal" pointing out the same thing. (Pet. 12-15.) The Delaware Respondents do not appear to disagree. At one point, they even cite with approval the Eleventh Circuit decision with which the Third Circuit disagreed. (Del. Opp. 6 (citing *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997).) Respondent Nails, by contrast, devotes eight pages of his opposition to arguing that the Third Circuit was right on the merits. (Nails Opp. 11-18.) But he largely misses the point, because he tackles the wrong argument. Instead of considering whether a *pro se* notice of appeal *that mentions late receipt of the district court's judgment* is equivalent to a separate motion that says the same, Nails addresses the argument that what he calls a "bare notice of appeal" should be construed as a motion to reopen under Rule 4(a)(6). (Nails Opp. 2.) But that is a straw man; it is not hard to understand why a court might be reluctant to construe a "bare" notice of appeal as a Rule 4(a)(6) motion, since there is nothing in a bare notice to indicate that late receipt of the district court's judgment—the particular problem Rule 4(a)(6) is designed to address—might account for the untimeliness. The argument

Respondent Nails attacks is also the wrong argument on the facts of this particular case. Petitioner's notice of appeal is not a "bare" notice; it states that Petitioner received notice of entry of judgment on May 6, 2002—just three days before the notice of appeal was filed—and uses underlining to highlight that fact. (Pet. App. 40a.)

4. As noted, the Delaware Respondents agree that there is a circuit split, do not disagree that it is important and recurring, and even seem to accept that the Third Circuit's categorical rule refusing to construe any notice of appeal as a motion to reopen may be unfair in certain cases. (Del. Opp. 6.) Their sole argument against certiorari is that they believe Petitioner will ultimately lose in the district court even if he wins in the Supreme Court, because, in their view, he cannot satisfy Rule 4(a)(6). (Del. Opp. 8-9.) But it is not clear whether Petitioner would win or lose under Rule 4(a)(6), and in any event the prospect of a possible eventual loss in the trial court is not a ground for declining to grant certiorari. If it were, this Court would decide very few cases, since a reversal in the Supreme Court will rarely guarantee that a petitioner will ultimately prevail in the lower courts.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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